STATE OF MICHIGAN

IN THE SUPREME COURT

TRI-COUNTY INTERNATIONAL TRUCKS, INC. ~~a Michigan Corporation~~, and IDEALEASE OF FLINT, ~~a Michigan Corporation,~~

Plaintiffs-Appellees,

vs.

HILLS' PET NUTRITION, INC., ~~a Michigan Corporation~~,

Defendant-Appellant.

Docket No.

Court of Appeals No. 255695
COA 12/25/05
Rec 1/27/06

Lenawee County Circuit Court
No. 02-986-CK
T. Pickard

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APPL
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29202

DEFENDANT HILLS' PET NUTRITION'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION AND ORDER APPEALED FROM

Defendant Hills' Pet Nutrition seeks leave to appeal the Michigan Court of Appeals' October 25, 2005 opinion (together with its January 27, 2006 order denying reconsideration of that opinion) that reversed Lenawee County Circuit Court Judge Timothy Pickard's May 3, 2004 order granting summary disposition in defendant's favor. See Court of Appeals' Opinion (***Exhibit A***), Court of Appeals' reconsideration order (***Exhibit B***), and Order granting summary disposition (***Exhibit C***).

This Court has jurisdiction under MCR 7.301(A)(2), which permits "review by appeal a case . . . after decision by the Court of Appeals," and under MCR 7.302(B)(3) and (5), which provide for appeals to this Court from Court of Appeals' decisions when the issues involve legal principles of significance to the state's jurisprudence or when an opinion is clearly erroneous and will call material injustice.

This Application for Leave to Appeal is timely filed, within 42 days of entry of the January 27, 2006 Court of Appeals' order denying defendant's timely-filed Motion for Reconsideration as to the October 25, 2005 opinion. MCR 7.302(C)(2)(c).

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STATEMENT OF QUESTIONS PRESENTED

I. Tri-County as an "Authorized Member"

Did Tri-County demonstrate "Authorized Member" status so that it could potentially secure indemnity under the "core" term of the parties' 1992 National Agreement, as drafted by Idealease?

The trial court answered the question, "No" and granted summary disposition in favor of Defendant Hills' Pet Nutrition, Inc.

The Court of Appeals majority (Judges Cavanagh and Smolenski) answered the question, "Yes." Judge Zahra dissented and would have affirmed the trial court's grant of summary disposition in Hills' Pet's favor on Tri-County's contractual indemnity claim.

Plaintiff Tri-County International Trucks, Inc. contends that the answer is "Yes."

Defendant Hills' Pet Nutrition, Inc. submits that the correct answer is "No" and asks this Court to peremptorily reverse the Court of Appeals and adopt Judge Zahra's dissent on this point.

II. Breach of the insurance procurement term as to Idealease of Flint

Hills' Pet procured the "additional insured" liability insurance for the benefit of Idealease of Flint that the contract allegedly called for. Can Hills' Pet still be liable for breach of the insurance procurement term?

The trial court answered the question, "No" and granted summary disposition in favor of Defendant Hills' Pet Nutrition, Inc.

The Court of Appeals answered the question, "Yes" and reversed the trial court's grant of summary disposition.

Plaintiff Idealease of Flint contends that the answer is "Yes."

Defendant Hills' Pet Nutrition, Inc. submits that the correct answer is "No" and asks this Court to peremptorily reverse the Court of Appeals.

III. Indemnity under the 1992 National Agreement

Contemporaneous with the signing of the 1992 National Agreement, which was negotiated nationally over a ten-month period, the contract's indemnity term proposed by plaintiffs' parent company was modified. It was modified to say that

Hills' Pet would not provide indemnity for the indemnified parties' "direct responsibility or negligence." Plaintiffs agree that indemnity is sought for claims of their alleged negligence. Does the modification apply and foreclose indemnity as a matter of law, including as informed by the surrounding circumstances?

The trial court answered the question, "Yes" and granted summary disposition in favor of Defendant Hills' Pet Nutrition, Inc.

The Court of Appeals answered the question, "No" and reversed the trial court's grant of summary disposition.

Plaintiffs Tri-County International Trucks, Inc. and Idealease of Flint contend that the answer is "No."

Defendant Hills' Pet Nutrition, Inc. submits that the correct answer is "Yes."

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REASONS WHY LEAVE SHOULD BE GRANTED (OR PEREMPTORY REVERSAL)

This is a high-stakes contractual indemnity dispute, with millions of dollars at issue. The last time this Court released an opinion in an express contractual indemnity case was 1985. The matter was last taken up as a mere side issue in *Bosak v Hutchinson*, 422 Mich 712 (1985). The Court has not *focused* on an express contractual indemnity issue since *Vanden Bosch v Consumers Power*, 394 Mich 428 (1975).

A date-confined topic search in Westlaw reveals that, since 1985, the Court of Appeals has released something in the neighborhood of 200 contractual indemnity opinions. Many of the opinions fight with one another about what methodology should be used to decide the cases. Some panels say the clear words of the contract rule unequivocally when it comes to the parties' intent and surrounding circumstances are not to be examined. *Martin v City of East Lansing,* 249 Mich App 288, 291 (2001). Some unapologetically examine the surrounding circumstances even when the words of the contract are clear. *Paquin v Harnischfeger*, 113 Mich App 43, 53 (1982). Some examine both the words of the contract and the surrounding circumstances, looking for the parties' intent. *Pritts v JI Case*, 108 Mich App 22, 28 (1975); *Chrysler v Brencal*, 146 Mich App 766, 772 (1985), *Sherman v DeMaria*, 203 Mich App 593, 598-599 (1994). Some cases speak to the subject in one way when they are first released but say exactly the opposite when they are amended after grant of reconsideration. Compare *Zurich Ins Co v CCR &* Co, 1997 Mich App LEXIS 368 (Mich Ct. App) (***Exhibit U***) with the same opinion on rehearing published at 226 Mich App 599 (1997). Sometimes "clear" words end up meaning indemnity is enforced. At other times the same supposedly "clear" words in another contract end up meaning indemnity is not enforced.

Indemnity contracts are said to merit special scrutiny because they impose "extraordinary liability." *Fireman's Fund v General Electric*, 74 Mich App 318, 323-324

(1977). Except often they merit no special scrutiny at all and they do not seem to even be regarded as disfavored, such as when panels say that "any and all claims" wording requires enforcement and forecloses all more nuanced inquiries about the parties' intent. *Calladine v Hyster*, 155 Mich App 175, 182 (1986); *Triple E v Mastronardi*, 209 Mich App 165, 173 (1995).

All of this confusion makes it impossible for businesses in Michigan to have any clear sense of whether or not indemnity is owed for bodily injury and property damage claims. In such an environment, the insurers who provide the state's businesses with comprehensive general liability coverage, which almost always includes "insured contract" coverage that applies to an insureds' indemnity liability, have no way of predicting or assessing the litigation risk to their insureds.

This case would give this Court an opportunity to establish rules for interpreting and applying indemnity contracts in a way that would bring order to this chaos of disparate case law.

Whatever rules of indemnity contract interpretation are applied, defendant submits that the Court of Appeals' majority got it grotesquely wrong when it reversed the grant of summary disposition as to Tri-County's indemnity claim against Hills' Pet. It decided that Tri-County had proven its status as an Idealease "authorized member" when, simply put, it had not. The majority *strained* to come up with an analysis of the words of the contract that would support such a view. This is *never* the proper approach when applying indemnity terms that the indemnifying party (Hills' Pet) did not draft. The paradox of how the majority (over Judge Zahra's dissent) decided that Tri-County *was* an "authorized member" when it came to the parties' paragraph ten indemnity term but was *not* an "authorized member" when it came to the parties' paragraph nine insurance procurement term is the clearest example of how the panel got it wrong.

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This case also presents an issue that this Court seems *never* to have decided. How exactly does a party breach a contract term that requires it to procure insurance for another party? Hills' Pet placed "owners" and "members," the parties that the contract arguably required it to procure insurance for, on Hills' Pet's auto liability policy as "additional insureds." Tri-County and Idealease of Flint, or more likely their insurers, were not satisfied because they apparently believed Hills' Pet's insurer should do more in terms of providing coverage to those additional insureds. Somehow, despite the fact that Hills' Pet complied with the contract requirements, the Court of Appeals ended up deciding that Idealease of Flint had a viable cause of action against Hills' Pet for breach of the insurance procurement term.

Defendant Hills' Pet submits that the Court of Appeals' decision was so aberrant on the question of applying the insurance procurement term that this Court should grant peremptory reversal. But if this Court chooses to write an opinion in the case, it would be the first time ever that this Court would speak to the issue.

In offices and shops and businesses of all sorts, all across this state, indemnity agreements are being signed. Those contracts very frequently also contain terms requiring the indemnifying party to place others on their insurance policy as additional insureds. These terms are in documents as seemingly unremarkable as invoices for delivered goods or as elaborate as multi-page contracts that are signed only after months of arms' length negotiations. There are a myriad of commercial transactions in between the two extremes. This case presents competing indemnity terms, one casual (and unenforceable, the Court of Appeals held) and one that was heavily negotiated. If this Court will see fit to grant leave to allow the appeal to go forward, this case has much to teach the bench and bar.

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STATEMENT OF FACTS

Background and Overview

This is a contractual indemnity case. The current posture of the case is that the parties have jointly funded a 2.3 million dollar settlement with the underlying injured party, Bruce Head and his wife. This appeal will unscramble the issue of who will bear the burden of that settlement.

Head sued (now plaintiffs) Idealease of Flint and Tri-County International Trucks, Inc. for their negligence related to those entities' service, lease or ownership of a semi-tractor, provided to Hills' Pet (Head's employer). That vehicle was dangerously defective. Employees of Tri-County serviced the vehicle, which was owned by Idealease of Flint. Tri-County employees removed a "red tag," which signaled that crucial repairs on a steering column recall were incomplete and provided the vehicle to Hills' Pet for Head's use. The steering system failed shortly after Head started driving. Head was severely injured. The Heads sued Tri-County and Idealease of Flint claiming negligence (only). Both companies then sued Hills' Pet, claiming that Hills' Pet owed them indemnity and that Hills' Pet had breached a contract term to procure liability insurance for their benefit.

In the trial court, the parties filed cross motions for summary disposition on their contractual disputes. The trial court denied Idealease of Flint and Tri-County's motion and granted Hills' Pet's. The Court of Appeals reversed the trial court on three out of four of its rulings. It held summary disposition should not have been granted to Hills' Pet on the indemnity claims. It found in favor of Hills' Pet on Tri-County's insurance procurement claim but against Hills' Pet on Idealease of Flint's insurance procurement claim.

Judge Zahra, writing in partial dissent, would have affirmed all aspects of the trial court's grant of summary disposition in Hills' Pet's favor as to Tri-County.

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The corporate entities and the contracts involved

Idealease of North America is a "truck rental and leasing corporation that provides services to [its] stockholders throughout North America." [1] Its president describes the company as a "stock company" with "affiliates" that include plaintiff Idealease of Flint.[2] Hills' Pet is a national pet supplies corporation. In 1992, Hills' Pet agreed to meet its fleet needs exclusively by leasing trucks from Idealease of North America members. Idealease Services, Inc. is a "subsidiary" of Idealease of North America.[3] Idealease Services, Inc. is the entity identified as the "lessor" in the parties' 1992 National Agreement.[4] "Hills, Division of Colgate Palmolive Company" is identified as the "customer" in that Agreement.

Plaintiff Idealease of Flint owns the International truck that Brian Head drove at the time of the accident.[5] It also owns stock in Idealease of North America.[6] William Kennedy, the president of the parent company, testified that every "member" corporation is a stockholder in Idealease of North America. [7] Idealease of Flint is the company identified as the "Lessor" in the 2000 Rental Agreement that also figured prominently in the case, until release of the Court of Appeals' opinion. The Court of Appeals' panel agreed with Hills' Pet that the Rental Agreement had no power to bind Hills' Pet. The plaintiffs were unable to show who signed the Rental Agreement and Idealease of Flint could not show that the unidentified person had any authority to bind Hill's Pet. In addition, Hills' Pet's proofs showed that no one had authority to bind it to indemnity terms outside the National Agreement.[8]

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[1] ***Exhibit F***, Kennedy Deposition, p 5 (president of Idealease of North America).
[2] *Id.*
[3] ***Exhibit G***, Murphy Deposition, p 20-21 (Vice President of Idealease of North America).
[4] ***Exhibit E*** is the 2/21/92 National Agreement; ***Exhibit E-1*** of that Agreement is its Schedule B Addendum modifying the core agreement's indemnity term.
[5] ***Exhibit H***, 2000 International title documentation; ***Exhibit F***, Kennedy Deposition, p 30.
[6] ***Exhibit F***, Kennedy Deposition, p 5.
[7] *Id.*
[8] ***Exhibit L,*** Affidavit of Sweet.

Brian Head's negligence lawsuit against Tri-County and Idealease of Flint

Idealease of Flint and Tri-County were sued by Brian Head and his wife for negligently providing a semi-tractor that the Heads say Tri-County and Idealease of Flint knew was unfit for the road. The Heads alleged that they were injured because Tri-County and Idealease of Flint provided Brian Head with a vehicle they knew "should not be driven on public highways" without any warning to him or his employer, Hills' Pet.[9]

Before the accident, Head was operating a 2001 Navistar truck bearing serial number 1HSHBAHN911350787 ("350787"). It needed repair. As Brian Sweet, Hills' Pet's team leader at its Lansing facility testified in his affidavit, Hills' Pet contacted Idealease and asked Idealease to pick up 350787 for service and, pursuant to the lease agreement, provide another vehicle that could be operated while 350787 was serviced.[10] On December 19, 2000, Idealease picked up 350787 and substituted a 2000 International truck. That International truck was the one Head was driving on January 4, 2001 when the accident happened.[11]

The truck that plaintiffs provided for Head's use was the subject of a recall. The recall related to the drag link, a component of the truck's steering mechanism. Although the vehicle was "red tagged," because its steering repairs were still incomplete, the plaintiffs removed the tag and leased it to Hills' Pet. The steering column failed and Head was injured in the resultant head-on collision.[12] Clearly, if the Heads' case had proceeded to verdict, instead of being settled, a judgment against Tri-County or Idealease of Flint would have been for their own negligent actions and inactions. That is proven by the allegations of the Heads' Complaint because only negligence was pled. It is also assured because this state has abolished joint

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[9] ***Exhibit K***, Heads' Complaint, ¶ 14.
[10] ***Exhibit L***, Sweet (team leader at Hills's Pet's facility in Lansing, Michigan), ¶3-5.
[11] *Id.*, ¶5-6; ***Exhibit K*** (Complaint), ¶18 (accident date); ***Exhibit F***, Kennedy Deposition, p 18 (2000 International 8100, VIN identifier, 271934). Titling documents on the 2000 International are at ***Exhibit H***.
[12] ***Exhibit K***, Heads' Complaint, ¶ 8-19.

liability and Tri-County and Idealease of Flint could only have been required to pay damages flowing from their own respective shares of fault.

The 1992 National Agreement drafted by Idealease, its negotiated Addendum modifying the core indemnity term, and the circumstances surrounding the negotiation of the contract

The February 12, 1992 National Agreement was negotiated over a period of ten months[13] by officers at the most senior levels of both Idealease Services, Inc. and Hills' Pet.[14] It was negotiated with the "intent" to "put in place a document" that would "document" the "relationship" between Idealease (and its members) and Hills' Pet as one of Idealease's national accounts.[15] The comprehensive terms of the National Agreement cover leased vehicles, "substitute" vehicles, "replacement" vehicles, "interim" vehicles and even "additional" vehicles.[16] Idealease's president testified that he would not "ever expect that a truck would be given to Hills,' in particular, without it being subject to the terms of [the National Agreement]."[17] Idealease agreed that the National Agreement also governs in the event a truck breaks down or needs maintenance.[18]

Daniel Murphy was the Idealease employee primarily responsible, along with its attorney, for negotiating and drafting the National Agreement.[19] He considers the contract to be a "form vehicle lease and service agreement" and agrees that it was an Idealease standard form that was modified based on negotiations he had with Hills' Pet.[20] When a particular strike-out in the National Agreement was pointed out to him, he explained that the Schedule B

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[13] ***Exhibit G***, Murphy Deposition, p 4-5 (from "about the 1st of May of 1991" to its signing in "February of 1992").
[14] ***Exhibit F***, Kennedy Deposition, p 33.
[15] ***Exhibit F***, Kennedy Deposition, p 9-10.
[16] ***Exhibit E***, National Agreement, ¶ 1 and 4F.
[17] ***Exhibit F***, Kennedy Deposition, p 34.
[18] *Id.*, p 34-35.
[19] ***Exhibit G***, Murphy Deposition, p 5.
[20] *Id.*, p 6.

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Addendum to the agreement "clarified that,"[21] thus bringing into focus the undisputed point that the National Agreement consists of the Idealease standard form agreement drafted by Idealease (that contains an indemnity term) *and* its Schedule B Addendum that modifies that indemnity term. Schedule B modifies the indemnity term to exclude indemnity for Idealease and its members' and owners' "direct responsibility or negligence."[22]

Paragraph 10 of the National Agreement, in its core term, is a broadly-worded hold harmless agreement that provides indemnity to categories of entities:

> 10. INDEMNIFICATION.
>
> Customer agrees to indemnify and hold: ***Lessor, Owner, IDEALEASE, INC., and all Authorized Members*** harmless from and against:
>
> A. Any claim or cause of action for death or injury to persons or loss or damage to property, arising out of or caused by the ownership, maintenance, use or operation of any Vehicle covered by this Agreement.
>
> B. All liability for the death of or injury to Customer, its employees, drivers, passengers or agents arising out of the ownership, maintenance, use or operation of any Vehicle covered by this Agreement.[23] [Emphasis added.]

But paragraph 10 of the National Agreement was amended (contemporaneously with its signing) by Schedule B to *exclude* indemnity whenever (as here) the liability is on account of the wannabe indemnitees' "direct responsibility or negligence." Schedule B provides for indemnity:

> *Unless* such action is proved to be the ***direct responsibility or negligence*** of Lessor..." [Emphasis added, ellipsis in original.][24]

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[21] *Id.*, p 6-7.
[22] ***Exhibit E-1***, Schedule B Addendum to the National Agreement, ¶10.
[23] ***Exhibit E***, National Agreement, p 4.
[24] ***Exhibit E-1,*** Schedule B Addendum, ¶ 10.

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The plaintiffs' *own* witness testified that it was the parties' intent that Hills' Pet not be made to pay indemnity when Idealease entities were sued for their own negligence. Listen to Idealease's chief negotiator, Dan Murphy:

> *Q.* Why was that [¶10 of Addendum] put in?
>
> *A.* I would speculate that to soften the standard indemnification language.[25]
>
> * * *
>
> *Q.* And *what was the reason* you under, understood *it was being negotiated for*?
>
> *A.* *To **soften** the standard indemnification language that's in our contract.*[26]

That intent is also the clear import of the words of the contract. The Addendum modifies the core agreement Idealease first proposed and turned a lion of an indemnity term into a kitten.

The Court of Appeals decided, as a matter of law, that Tri-County was an "Authorized Member" entitled to indemnity under the National Agreement's core indemnity term. But the record clearly shows that Tri-County (Idealease of Flint's repair facility) was not an "Authorized Member" as to the vehicle Head was driving.

As the Idealease parent company's president testified, *every* "member" is a stockholder in Idealease of North America, the Idealease parent company. When asked, "Is Tri-County International Trucks, Inc. a stockholder," Kennedy answered, "I don't believe so."[27] The parent company's vice-president agreed with the president. When the vice-president was asked: "Is Tri-County International Trucks a member company," he answered, "No. It's --their leasing company is...".[28] In Tri-County's (supplemental) answer to defense Requests to Admit that there was no document which was attached to the "Vehicle Lease and Service Agreement"

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[25] ***Exhibit G***, Murphy Deposition, p 14.
[26] *Id.*, p 16.
[27] ***Exhibit F***, Kennedy Deposition, p 6.
[28] ***Exhibit G***, Murphy Deposition, p 22.

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(the National Agreement) "that identifies plaintiff as an 'Authorized Member'" Tri-County admitted this.[29] In the Court of Appeals, Tri-County described itself this way: "Idealease of Flint, Inc., a Michigan corporation, is one of the dealer-owners . . . Plaintiff-Appellant, Tri-County International Trucks, Inc. . . . was not a dealer-owner but repaired trucks provided by Idealease of Flint, Inc. to Hills'."[30]

Both Tri-County and Idealease of Flint are, in their attorney's words, "owned by the same corporation."[31]

The core part of the National Agreement, drafted by Idealease and not *Hills' Pet*, defines the terms "Members" and "Authorized Member." "Authorized Member" is a status "Members" may achieve, but only vehicle-by-vehicle, when a Member is "authorized to perform the services for the vehicles" listed on a particular Schedule A:

> (5) M. Lessor is a wholly owned subsidiary of IDEALEASE, INC., an Illinois trade association. The members of Idealease, Inc. ("Members") are independently owned truck leasing companies. Lessor intends to contract with one or more of the Members for the duties and obligations of Lessor under this agreement. Each Schedule A to this Agreement shall indicate the Member authorized to perform the services ***for the Vehicles listed on that Schedule (the "Authorized Member")***. IDEALEASE, INC., nor any of the Members are a party to, or assume liability under, this Agreement. [Emphasis added.]

The vehicle that Head was driving when the accident happened is not even listed on a Schedule A. To support its claimed Authorized Member status, Tri-County relied only on a 1994 Schedule that identified it as an "Authorized Member *For Vehicles Shown on . . .*" that Schedule.[32]

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[29] ***Exhibit I***, Supplemental Answers to Requests to Admit, Item 4, plaintiffs responded: "I agree that this is so but I cannot say that there is not an exhibit somewhere that says otherwise."
[30] Plaintiffs' Appeal Brief, p 2.
[31] 4/23/04 summary disposition hearing transcript, p 6, ***Exhibit J***.
[32] The 1994 Schedule A is attached as ***Exhibit T.***

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The 2000 Rental Agreement

The 2000 Rental Agreement[33] is a two-sided form document that was never negotiated between the parties. It was apparently provided to whoever picked up the truck that ultimately injured Brian Head. Tressa Hornok, a rental clerk at Idealease of Flint, filled it out.[34] No one knows who signed the Rental Agreement.[35] Certainly, whoever signed it did not have authority to sign it on Hills' Pet's behalf or to bind Hills' Pet to an indemnity term that conflicted with the National Agreement.[36]

On the "flip" side of the Rental Agreement, there is an indemnity term that is much broader than the parties' National Agreement. Although this Rental Agreement figured prominently in the parties' Court of Appeals briefing, it is no longer of interest because the Court of Appeals ruled that it could not be considered as potentially creating an indemnity obligation. No one knows who signed it and there is no proof that, whoever signed it, had any authority to bind Hills' Pet. (***Exhibit A,*** Court of Appeals Op, p 4-5).

It is worth noting that Idealease of Flint's indemnity argument in the Court of Appeals was a singularly focused one. It sought indemnity *only* under the 2000 Rental Agreement and not under the National Agreement. This is a sample of what Idealease of Flint wrote in its appellate briefs to make that point clear:

> It is important to note that Tri-County claims indemnity and insurance only pursuant to the terms of the "VEHICLE LEASE." ***Idealease of Flint, Inc. claims indemnity and insurance only pursuant to the terms of the "RENTAL AGREEMENT."*** Each of the claims of plaintiffs/appellants must be considered separately. (Tri-County/Idealease of Flint's Brief, p 4-5). [Emphasis added.]

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[33] ***Exhibit M***, the 2000 invoice.
[34] ***Exhibit N***, Hornok Deposition, p 64, 65.
[35] ***Exhibit N,*** Hornok Deposition, p 64; ***Exhibit L***, Sweet Affidavit, ¶8; ***Exhibit G***, Murphy Deposition, p 38-39.
[36] ***Exhibit L***, Sweet Affidavit, ¶9 ("Whoever would have signed the invoice did not have my or Hills' Pet's authority to sign it").

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In numerous additional places within plaintiffs' Court of Appeals briefs, Idealease of Flint set forth its position that indemnity (and insurance procurement obligations) were owed to it *only* under the Rental Agreement. See ***Exhibit D***, reciting those additional passages. The Court of Appeals saw fit to restructure Idealease of Flint's argument and to grant it indemnity under an agreement it never claimed (on appeal) had such power.

The insurance procurement terms

In addition to plaintiffs suing Hills' Pet for indemnity, they claim that Hills' Pet breached the National Agreement (and Rental Agreement) terms governing insurance procurement. The Rental Agreement terms do not matter now, since the Court of Appeals held that "contract" unenforceable. The insurance terms of the National Agreement Idealease drafted are such a muddle that one might as well consult a Ouija Board as law books to decipher them.[37] But Hills' Pet met even the most stridently plaintiff-favorable interpretation of the insurance terms *because it purchased the additional insured coverage plaintiffs claim it should have*. In fact, Hills' Pet's insurer participated in defense of Idealease of Flint in the Head action. These uncontroverted facts did not, however, stop the Court of Appeals from

[37] The insurance term of the National Agreement states at ¶9A that the "party designated on Schedule A shall maintain" liability insurance, but there are *numerous* parties listed on *numerous* multiple years of Schedule A's. It is impossible to know which party listed on Schedule A was supposed to procure liability insurance. Paragraph 9A of the National Agreement continues on to direct who should have the benefit of "said coverage." It:

> ...shall include as insureds, Customer, Lessor, owner, Idealease Inc., Authorized Members and such other parties as determined by Lessor."

The ambiguity of who has the responsibility to provide insurance coverage is compounded by subparagraphs (2) and (3) of paragraph 9A. Those subparagraphs set forth the insuring duties in totally conditional terms that make it clear that sometimes the lessor is supposed to carry the insurance and sometimes the customer is supposed to. Subparagraph (2) says: "*If Lessor* is designated to provide Liability Insurance," Subparagraph (3) maintains the iffy tone: "*If Customer* is designated to provide Liability Insurance."

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deciding that Idealease of Flint could still pursue a cause of action against Hills' Pet for damages for breach of contract terms regarding procurement of insurance.

What complicated the question of whether Hills' Pet's insurer would defend the plaintiffs had nothing to do with Hills' Pet. Both plaintiffs *also* prudently purchased their *own* liability insurance. This created a priorities question between the insurers as to which insurance was primary and which was only excess. As to that dispute, Hills' Pet could do nothing more than stand and watch, since it is not its own insurer.

Plaintiffs allege that Hills' Pet had a "duty to provide liability insurance coverage for the protected parties . . . in order to secure its obligation to indemnify."[38] Leaving aside the ambiguities of the insuring terms that Idealease drafted, see footnote 37, *the undisputed fact is that Hills' Pet* purchased *exactly* the insurance Idealease of Flint claims the National Agreement called for. The Certificate of Insurance issued by Marsh USA, "valid as of 12/26/00" (before Head's accident), documents that fact.[39] In addition to covering Hills' Pet Nutrition, Inc., Hills' Pet Nutrition Sales, Inc. and Hills' Canadian operations, the Travelers Insurance Company of Illinois motor vehicle policy Hills' Pet purchased provided coverage for Idealease "owners" and "members" as "additional insureds:"

> THE FOLLOWING ARE INCLUDED AS ADDITIONAL INSUREDS AND LESSORS: IDEALEASE SERVICES INC., IDEALEASE INC. ***AND ITS MEMBERS*** WHO PROVIDED, LEASED OR RENTER [SIC] "AUTOS" TO THE NAMED INSURED ***INCLUDING OWNERS*** OF ANY SUCH "AUTOS." [Emphasis added.][40]

Travelers' Declaration Sheet[41] confirms that, for the relevant time period, Hills' Pet paid for a policy that provided "additional insured" coverage" for *anyone* Hills' Pet agreed would have status as an "owner" or Idealease "member." This would include Idealease of Flint and,

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[38] ***Exhibit O***, Plaintiffs' First Amended Complaint, ¶ 21.
[39] ***Exhibit P***, Certificate of Insurance.
[40] ***Exhibit P,*** Certificate of Insurance.
[41] ***Exhibit Q,*** Insurance Declarations.

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indeed, even Tri-County if it had ever been able to come forth with evidence of member status sufficient to satisfy Hills' Pet's insurer.

As documented in Travelers' letter to plaintiffs, [42] Travelers did not accept that Tri-County is...what it isn't (a "member"). The Court of Appeals agreed with Hills' Pet's insurer (not a party to this case) on this point. As for Idealease of Flint, Travelers accepted it potentially had coverage but it took the position that Traveler's policy would not be first in priority given the existence of Idealease of Flint's *own* policies.[43] Despite that position, as Idealease acknowledges, Travelers *has* defended Idealease. See Plaintiffs' Brief in Support of Summary Disposition, p 7: "Idealease of Flint, Inc is being provided a defense to the Bruce Head case by Travelers Insurance Company, the insurer of Hills' Pet Nutrition, Inc."

The summary disposition motions and the trial court's rulings

The parties all claimed the right to summary disposition as a matter of law. After extensive argument, Lenawee County Judge Pickard denied plaintiffs' Motion for Summary Disposition and granted Hills' Pet's Motion. Plaintiffs' counsel argued about the indemnity terms of the National Agreement without taking into account the Addendum. Judge Pickard pointed out that the Addendum to the agreement "relieves them [Hills' Pet] from" paying indemnity for "the negligence of Idealease."[44] Judge Pickard's alert response to the claim that the National Agreement's indemnity language was "unequivocal" was to say: "Let me ask you about Schedule B of the Master Agreement...Schedule B says in Paragraph 10, 'Unless such action is proved to be the direct responsibility of the lessor?"[45] Given the Head lawsuit and Schedule B, Judge Pickard said "direct responsibility of negligence" was "what this whole

[42] ***Exhibit R***, Letter from Travelers to attorney Shea.
[43] ***Exhibit R***, Letter from Travelers to attorney Shea.
[44] ***Exhibit J,*** Hearing transcript, p 11.
[45] *Id.*, p 32.

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lawsuit is about."[46] Judge Pickard emphasized that if Idealease of Flint was "shown to be responsible" to Head it would fall into the type of claim for which Hills' Pet would have no indemnity obligation.[47]

Plaintiff Tri-County argued that it was an "Authorized Member" who could claim indemnity under the National Agreement simply because it had been involved in repair of the truck. When Judge Pickard asked plaintiffs' counsel whether Tri-County was an Authorized Member, plaintiffs' counsel responded cryptically: "They were an authorized member by virtue of its configuration with the vehicle at the time it was released."[48] The issue of Tri-County's answer to Hills' Pet's Request to Admit was also raised.[49] Asked to admit that there was "no document which was attached to the 'Vehicle Lease and Service Agreement' [the National Agreement] that identifies Plaintiff [Tri-County] as an 'authorized member'," Tri-County answered: "***I agree that this is so*** but I cannot say that there is not an exhibit somewhere that says otherwise."[50] Judge Pickard rejected Tri-County's argument that simply being allowed to repair a vehicle would make the repair entity an "authorized member" under the National Agreement.[51]

As soon as plaintiffs' counsel moved on to discussion of the 2000 Rental Agreement, Judge Pickard correctly pointed out that it was not applicable because it was not known who signed it.[52] That view prevailed in the Court of Appeals.

Judge Pickard also grasped all the salient details of plaintiffs' breach of insurance term claim. He questioned plaintiffs' counsel and learned that Hills' Pet provided plaintiffs with the

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[46] *Id.*, p 32.
[47] *Id.*, p 41.
[48] *Id.*, p 64.
[49] *Id.*, p 62.
[50] ***Exhibit I***, Supplemental Responses to Request to Admit.
[51] ***Exhibit J,*** 4/23/04 hearing transcript, p 67.
[52] *Id.* p 14.

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policies. Judge Pickard was of the view that plaintiffs "should have apparently read or looked at it [the policy] ahead of time."[53]

As the hearing ended, Judge Pickard summed up his key rulings. He explained that the "second" [the 2000 Rental Agreement] indemnity term did not apply because it was not "a second" contract that was "enforceable."[54] His view was that the Addendum to the National Agreement that reined-in the indemnity term to exclude indemnity for the indemnified parties' "direct responsibility or negligence" was "not used artfully by the drafters" in terms of its reference to "lessor."[55] However, Idealease could not claim indemnity "since the only allegations are the negligence of Idealease of Flint, which the court believes is referred to as the lessor under this addendum...."[56] Tri-County's indemnity theory under the National Agreement was disallowed based on it not being able to show it was an Authorized Member.

An order granting Hills' Pet summary disposition was entered on May 3, 2004. Plaintiffs' timely claimed an appeal as of right to the Court of Appeals.

The Court of Appeals Opinion: the majority says Hills' Pet loses on both indemnity claims and Idealease's claim of breach of the insurance term but not on Tri-County's claim of breach of the insurance term. Judge Zahra says Hills' Pet wins it all as to Tri-County.

All members of the panel agreed that Hills' Pet had not breached the insurance term of the National Agreement as to Tri-County. The panel affirmed that aspect of Judge Pickard's grant of summary disposition in Hills' Pet's favor. The panel ruled that Tri-County was not among the group of entities the contract's insurance procurement term referred to as "Authorized Members." ***Exhibit A***, Court of Appeals Op, p 4. Judge Zahra agreed with that

[53] *Id.*, p 21.
[54] *Id.*, p 78.
[55] *Id.*
[56] *Id.*

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result. *Id.*, J. Zahra, p 1. The majority discussed the 1994 Schedule A[57] and explained that "Authorized Member" status for purposes of the insurance procurement term in the National Agreement was a vehicle-by-vehicle determination:

> Tri-County claims that it is an "Authorized Member." The Schedule A discussed above suggests that Tri-County is an "Authorized Member," but only "for vehicles shown on this Schedule A." There is no "all" qualifier here as there was for the indemnity term, so Tri-County must be considered an Authorized Member only with respect to the trucks listed on that Schedule A. [***Exhibit A***, Court of Appeals Op, p 4.]

Because Tri-County was clearly not an "Authorized Member" except with respect to vehicles listed on the 1994 Schedule A, Hills' Pet was held to owe Tri-County no obligation under the insurance procurement term of the National Agreement:

> Accordingly, we agree with defendant that Tri-County does not qualify under the "Authorized Member" language, and therefore is not a party entitled to receive insurance. *Id.*

Paradoxically, the majority (but not dissenting Judge Zahra) decided that the core indemnity language of the National Agreement *granted* Tri-County indemnity against Hills' Pet because Tri-County *was* "any Authorized Member." This was the way the majority explained it:

> In sum, Tri-County is entitled to indemnification because it falls within the "all Authorized Members" terms of the provision, its claim satisfies the language of the indemnity agreement, the claim is not excepted by the addendum, and the claim is not prohibited by the tort reform statute, MCL 600.2956. Therefore the trial court erred in granting summary disposition to defendant and in denying Tri-County's indemnification claim. [*Id.*]

The notion that Tri-County was not an "Authorized Member" for insurance term purposes, but *was* "any Authorized Member" for the same contract's indemnity term purposes is what Judge Zahra disagreed with. As he understatedly expressed it: "The majority places great emphasis on the word 'all'...". *Id.*, J. Zahra, p 2. That the Head claim was not "excepted" by the

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[57] ***Exhibit T.***

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Addendum will be addressed in Hills' Pet's argument, within Argument III. The majority's idea that the indemnity claim might be "prohibited" by MCL 600.2956, which abolished joint liability, was not something Hills' Pet argued.[58]

The panel understood that Idealease of Flint only claimed indemnity obligations under the Rental Agreement, not the National Agreement:

> Idealease of Flint contends that it is entitled to indemnity and insurance under the terms of the 2000 rental agreement. [***Exhibit A***, Court of Appeals Op, p 4.]

It held, quite correctly, that the plaintiffs had failed to prove who signed the rental agreement and failed to counter Hills' Pet's proofs that *no one* had authority to modify the indemnity terms of the National Agreement.[59] *Id.*, p 4-5. However, instead of ending the inquiry once Idealease of Flint lost its indemnity argument based on the Rental Agreement, the panel looked to the National Agreement as well. It decided that Hills' Pet had "conceded" that Idealease of Flint "issues of insurance and indemnity" were subject to the National Agreement, *id.*, p 5. It wrote that "since [Hills' Pet] concedes it is the national agreement that controls, [it] cannot deny that the indemnification provision in the national agreement applies to Idealease of Flint's claim." *Id.*, p 6. The panel then proceeded to hold that Hills' Pet should lose summary disposition as to Idealease of Flint's indemnity claim.

The majority's analysis of the relationship between the National Agreement's core indemnity term and the Addendum is written as if it was unaware of Hills' Pet's argument that the Addendum's amendment of the indemnity term to exclude the negligence of the "lessor... [ellipsis]" meant "lessor, owner, Idealease, Inc. and all Authorized Members." Hills' Pet argued that since that grouping of four parties was repeated throughout the contract, and given

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[58] What Hills' Pet *did* argue, which seems to be what the panel misconstrued, is that the Addendum exception to indemnity applied because Head only sued Tri-County and Idealease of Flint for their negligence and, in an era of several liability, the panel could be confident that the plaintiffs would only have to pay for their own negligence (not someone else's).

[59] ***Exhibit L,*** Affidavit of Sweet, ¶9.

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the grammatical function of an ellipsis as signifying omitted language understood by the parties, the Addendum's use of the ellipsis signified that the softening of the indemnity also applied to owners and Authorized Members. The panel ruled that the softening of the indemnity agreement only applied to the "lessor," defined in the National Agreement as "Idealease Services, Inc." (a party that all understood was not actually leasing under the agreement). This was the ruling even though Idealease of Flint argued only from the Rental Agreement which defined *it* as the lessor. The panel explained why Idealease of Flint's tort obligation to Bruce Head should pass to Hills' Pet, Head's employer via a contract Idealease of Flint did not rely on:

> [T]he national agreement was modified by the addendum which precluded indemnity where it was for action "proved to be the direct responsibility or negligence of the Lessor. . . ." There is no contention that the indemnity sought by Idealease of Flint is for action resulting from the negligence of the Lessor, which is, under the national agreement, Idealease Services, Inc. Therefore the addendum does not preclude Idealease of Flint's indemnity claim. [*Id*, p 6.]

The majority wrote that Idealease of Flint "qualifies under 'Owner' or 'all Authorized Members'," for indemnity under the national agreement. *Id.* The panel wrote: "The terms of the indemnity promise are applicable and indemnity is owed." *Id.*

Judge Zahra concurred in part and dissented in part. He disagreed with the majority, to the extent that he would have ruled that Hills' Pet did not owe indemnity to Tri-County. He saw no difference between insurance procurement obligations owed to "authorized members" and indemnity obligations owed to "all authorized members." He would have held not only that Hills' Pet did not owe any obligation to procure insurance for Tri-County's benefit, but also that Hills' Pet did not owe Tri-County any indemnity obligation. ***Exhibit A,*** J. Zahra, p 2.

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Hills' Pet timely filed a motion for reconsideration. On January 27, 2006, the Court of Appeals entered an order denying reconsideration. This Application for Leave to Appeal is timely filed.

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STATEMENT OF STANDARD OF REVIEW

The interpretation of contract terms presents an issue of law that is reviewed *de novo*. *Bandit Industries v Hobbs Intl Inc (After Remand)*, 463 Mich 504, 511 (2001). In the contractual indemnity context, see, e.g., *Grand Trunk Western Railroad v Auto Warehousing Co.*, 262 Mich App 345, 349-350 (2004); *Daimler Chrysler Corp v G-Tech Professional Staffing*, 260 Mich App 183, 185 (2003).

In addition, this Court reviews a trial court's decision whether to grant a motion for summary disposition *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118 (1999).

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ARGUMENT I

Tri-County did not demonstrate "Authorized Member" status and could not possibly have any right of indemnity even measured by the "core" term of the parties' National Agreement. Judge Zahra, writing in dissent, reached the correct result as to Tri-County. At a minimum, this Court should peremptorily reverse the majority and adopt Judge Zahra's dissent.

a. General indemnity law considerations.

Indemnity contracts are generally construed the same way other contracts are. *Martin v City of East Lansing*, 249 Mich App 288, 291 (2001); *DaimlerChrysler Corporation v G-Tech Professional Staffing*, 260 Mich App 183, 185 (2003). "Where the language of a writing is not ambiguous, its construction is a question of law for the court and it is the duty of the court, not the jury, to define what is and what is not within the terms of a written contract." *Craib v Presbyterian Church*, 62 Mich App 617, 620 (1975). In accord, in the indemnity context, *Chrysler v Brencal*, 146 Mich App 766, 775 (1985), *so long as the contract of indemnity is unambiguous*, its construction is for the court to determine as a matter of law "and the plain meaning of the [indemnity] contract may not be impeached with extrinsic evidence." *Zurich Insurance v CCR & Co (On Reh)*, 226 Mich App 599, 604 (1997).

But contracts of indemnity impose "extraordinary liability" and this makes it imperative that they be enforced only and strictly in accord with their terms. *Fireman's Fund v General Electric*, 74 Mich App 318, 323-324 (1977). Indemnification is a disfavored risk-shifting device and a contract purporting to indemnify a party against the consequences of its own negligence, in particular, will be enforced only where the terms are unambiguous. *Palomba v East Detroit*, 112 Mich App 209, 217 (1982); *Reed v St Clair Rubber*, 118 Mich App 1 (1982).

b. What an "Authorized Member" is and why Tri-County isn't one.

The majority decided that because the core indemnity term in the National Agreement referenced indemnity for "all Authorized Members," and since Tri-County was once an authorized member, in 1994, with respect to trucks Head was not driving, Hills' Pet owed indemnity. Judge Zahra dissented. He would have affirmed Judge Pickard's grant of summary disposition on the indemnity claim, as well as on Tri-County's insurance procurement claim.

The core part of the National Agreement, as drafted by Idealease not *Hills' Pet*, defines the terms "Members" and "Authorized Member." "Authorized Member" is a status "Members" may achieve, but only vehicle-by-vehicle, when a Member is "authorized to perform the services for the vehicles" listed on a particular Schedule A:

> (5) M. Lessor is a wholly owned subsidiary of IDEALEASE, INC., an Illinois trade association. The members of Idealease, Inc. ("Members") are independently owned truck leasing companies. Lessor intends to contract with one or more of the Members for the duties and obligations of Lessor under this agreement. Each Schedule A to this Agreement shall indicate the Member authorized to perform the services ***for the Vehicles listed on that Schedule (the "Authorized Member***"). IDEALEASE, INC., nor any of the Members are a party to, or assume liability under, this Agreement (emphasis added)

The vehicle that Head was driving when the accident happened is not even listed on a Schedule A. Tri-County cannot possibly be an "Authorized Member" with respect to that vehicle.

In addition to the words of the contract, plaintiffs' own witnesses testified that Tri-County is no "Member" and therefore "Authorized Member" status must elude them as well. Idealease's president testified that if a company is a "member," the company would be a stockholder of Idealease of North America.[60] Paragraph 5(M) of the National Agreement makes it clear that a company cannot be an "Authorized Member" unless it is also a "Member" (because an "authorized member" is "the member" who is "authorized…."). But Idealease's

[60] ***Exhibit F***, Kennedy Deposition, p 6.

parent company's president testified that every "member" is a shareholder/stockholder in Idealease of North America. Asked if Tri-County was a stockholder he answered, "I don't believe so."[61] The company's vice-president agreed with its president that Tri-County was no member. Asked if Tri-County was a "member company" the vice-president answered, *"No"* and stated that Tri-County's "leasing company is" the member ("No, It's—their leasing company is...").[62]

What the majority hung its hat on was the force of one "Schedule A," from early 1994.[63] That 1994 schedule contains information on five Hills' Pet leased vehicles but not the one Head was driving when injured in 2000. In the lower left hand corner the 1994 Schedule A states:

AUTHORIZED MEMBER FOR
VEHICLES SHOWN ON THIS
SCHEDULE A:

TRI-COUNTY INTL.
WARREN, MI

It does not comport with the record established in the trial court, or with the parties' contract, to supply Tri-County with "authorized member" status (and therefore indemnity) based on a 1994 "Schedule A" on vehicles other than the one Head was driving when injured. The 1994 Schedule A creates such status only as to the five vehicles "shown on" the Schedule.

To permit Tri-County to go forward with its indemnity claim based on its alleged Authorized Member status, when that status has not been demonstrated with respect to the vehicle Bruce Head was driving, turns indemnity law principles of construction inside out. There is no way Tri-County even got "close" to demonstrating its status as an "Authorized Member" potentially entitled to indemnity under the National Agreement. This is how Judge

[61] ***Exhibit F***, Kennedy Deposition, p 6.
[62] ***Exhibit G***. Murphy Deposition, p 22.
[63] ***Exhibit T,*** attached.

Zahra explained it, writing in dissent. First, he rejected the notion that once a party was an authorized member it would somehow be entitled to indemnity forever:

> I reject the implicit conclusion of the majority that once Tri-County was identified as an Authorized Member it would always be an Authorized Member for purposes of indemnification. The national agreement is silent as to the meaning of Authorized Member. ***Exhibit A,*** J. Zahra, p 2.

Judge Zahra described the 1994 Schedule A relied upon by the majority and then explained why the document could not be relied on to create an indemnity obligation that would bind Hills' Pet to be responsible for paying for Tri-County's settlement with Head:

> The plain language of this document indicates that Tri-County's authorized membership is limited to the five vehicles identified in Schedule A. Because the accident giving rise to Tri-County's claim of indemnification did not involve one of the five vehicles identified in the 1994 Schedule A, Tri-County was not, by definition, an Authorized Member. Therefore, Tri-County is not entitled to indemnification. (***Exhibit A,*** Court of Appeals Op, J. Zahra, p 2).

The majority's simplistic notion that: "If Tri-County is an authorized member as to some trucks, it must fall within the scope of 'all Authorized Members'" fights with the parties' own agreement and defies the principle that Michigan courts only enforce indemnity contracts when unambiguous terms or the surrounding circumstances require it. The majority's ruling also belies the record of deposition testimony in this case and ignores the complexity of these parties' contractual relationship.

"[I]ndemnity contracts are construed strictly against the party who drafts them and against the indemnitee." *Sherman v DeMaria Bldg*, 203 Mich App 593, 596 (1994). The majority forgot all about that principle and reached a clearly wrong result as to Tri-County's indemnity claim.

Judge Zahra was right. The proofs were all "one way" that Hills' Pet was entitled to full summary disposition on all of Tri-County's claims. The party seeking indemnity is the one

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who must prove that entitlement. Tri-County failed in that task. At a minimum, this Court should perform the task of error-correction and peremptorily reverse the Court of Appeals as to Tri-County's indemnity claim.

ARGUMENT II

Hills' Pet procured the "additional insured" liability insurance for the benefit of Idealease of Flint that the contract allegedly called for. Hills' Pet has performed its contract and cannot possibly be liable for breach of the insurance procurement term in the National Agreement.

Hills' Pet purchased auto liability insurance on the vehicle Head was driving at the time of the accident. That insurance policy protected Hills' Pet as well as vehicle owners and all Idealease "members." The evidence on these facts is all "one way" in favor of Hills' Pet. The Certificate of Insurance documents the "additional insured" coverage Hills' Pet bought,[64] as does the Travelers Insurance Company's Declarations pages,[65] as does the correspondence from Travelers that was entered into the record below.[66]

Hills' Pet is a subsidiary of Colgate Palmolive. Colgate Palmolive maintained an auto insurance policy issued by Travelers Insurance Company. The Certificate of Insurance recites, and neither the plaintiffs nor Travelers disagree, that owners and all Idealease members are additional insureds:

> The following are included as additional insureds and lessors: Idealease Services, Inc., Idealease Inc. and its members who provided leased or rente[d], 'autos' to the named insured including owners of any such 'autos'.[67]

Courts cannot make contracts for the parties and neither can they change contract terms. *Purlo Corp v 3925 Woodward*, 341 Mich 483, 487 (1955). Assuming the insurance

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[64] ***Exhibit P.***
[65] ***Exhibit Q.***
[66] ***Exhibit R.***
[67] ***Exhibit P.***

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In other words, if Idealease of Flint thinks it got a raw deal from an insurer that has nothing to do with Hills' Pet, Hills' Pet cannot be potentially liable to pay damages for breach of the National Agreement's insurance procurement term because it purchased exactly the insurance it (allegedly) promised to.

Not many courts have had to face this issue because the plaintiffs' argument, and the Court of Appeals acceptance of that argument, is completely aberrant. But the issue did arise in *Garcia v Great Atlantic & Pacific Tea*, 231 AD 2d 401; 647 NYS2d 2 (1996). The appellate court reversed a trial court order that granted summary judgment in favor of a party (A & P) who had been promised additional insured coverage that never materialized even though the promisee (3rd party defendant Domestic Linen) procured it. When a party procures the insurance a contract calls for, it is not liable if the additional insured is dissatisfied with the *insurer's* performance on *its* contract:

> The [trial] court mistakenly concluded that Domestic's contractual obligation required it to cover the cost of defense and indemnification where the insurance company disclaimed an obligation to defend and indemnify A & P, the party for whom the insurance was procured; the parties' contract did not impose this obligation upon Domestic. [*Garcia* at 402.]

The *Garcia* panel explained that "to the extent A & P might be aggrieved" by the insurer's action or inaction on its behalf, "its proper remedy is to bring a declaratory judgment action" against the insurer "directly, based upon its rights as an additional insured."

This was also the holding in *Roffi v Metro-North Commuter RR*, 2001 US Dist LEXIS 20265 (SD NY), ***Exhibit S.*** Third-party defendant Lehrer McGovern was sued by Metro-North under an indemnity agreement and also for failure to procure liability insurance to supply Metro-North with coverage as an additional insured. *5. In fact, however (as here), Lehrer McGovern *had* added Metro-North as an additional insured on its policy with American International Group (AIG). *6. Even after a trial on the underlying injury case determined that

procurement terms required Hills' Pet to procure insurance for the Idealease entities (and not the other way around), Hills' Pet merely agreed that certain categories of entities would be "include[d] as insureds" on its auto policies. Hills' Pet satisfied this obligation by adding those categories of persons to its policy.

Full performance of a contract discharges a party's duty under the contract, *Woody v Tamer*, 158 Mich App 764, 771 (1978). In fact, even "substantial" performance is sufficient and the notion of what constitutes "substantial" is flexible. *Antonoff v Basso*, 347 Mich 18, 28 (1956); *Gordon v Great Lakes Bowling*, 18 Mich App 358, 363 (1969). To recover for breach of contract (here, to add parties to an insurance policy), Idealease of Flint would have to prove: that the contract existed between the parties, that Hills' Pet breached the contract, and that it was damaged by that breach of contract. M Civ JI 140.01.[68]

Agreements to procure insurance are different from indemnity agreements because "the risk of loss is not intended to be shifted to one of the parties, but is instead intended to be shifted to an insurance company." *Indiana Erectors v Indiana University*, 686 NE2d 878, 880 (Ind App, 1997).

Zettel v Paschen Contractors, Inc, 427 NE d 189, 191-192 (Ill App, 1981) explains that promising to purchase insurance is not the same as promising indemnity and that one who purchases insurance is not itself an insurer:

> [A] promise to obtain insurance is not the same as a promise to indemnify. Under an indemnity agreement, the promisor agrees to assume all responsibility and liability for any injuries or damages. Under an agreement to obtain insurance the promisor merely agrees to procure the insurance and pay the premium on it. ***Once the insurance is obtained the promisor bears no responsibility in the event of injury or damage****, even if the insurer should breach the insurance agreement through no fault of the promisor.* [Emphasis added.]

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[68] The standard jury instruction deals with UCC breaches, but the rule is no different for non-UCC cases.

Metro-North negligently supervised the insured project, which was a circumstance that clearly activated the additional insured coverage, AIG did not "modif[y] its decision to deny insurance coverage to Metro-North." *Id.* Lehrer McGovern argued that it had "not breached its contract because it has procured the requisite insurance," *id.* The District Court agreed:

> Clearly, the mere fact that coverage has been denied by an insurance company does not mean that such coverage does not, in fact, exist under the contract. Therefore, the decision of an insurer to deny coverage to a party does not, in itself, constitute a breach of an insurance procurement provision by the party responsible for procuring the insurance, particularly where there is no dispute as to the facial sufficiency of the policy that was procured. * 29.

"Since a breach of contract [could not] be proven based upon the undisputed facts contained in the record," Lehrer McGovern was entitled to summary judgment.

There has been no breach of the insurance procurement term here, as the Court of Appeals should have plainly seen. Not only was the correct insurance procured, Travelers even participated in defending Idealease of Flint. The Court of Appeals was wrong *in every way possible*. It somehow twisted the fact that Hills' Pet purchased the additional insured coverage and that Travelers was defending Idealease of Flint as if this evidenced a breach of contract:

> [Hills' Pet] next argued that it "obtained liability insurance for the benefit of everyone" for whom it "could possibly have been required to" provide it; [Hills' Pet's] brief also concedes that "Idealease of Flint was the 'Owner.'" Accordingly, as to Idealease of Flint, [Hills' Pet] does not dispute that it had a duty to provide insurance under the terms of the national agreement. Therefore, the trial court's grant of summary disposition in defendant's favor and against Idealease of Flint, on this issue of insurance, must be reversed. [***Exhibit A,*** Court of Appeals Op, p 6.]

The Court of Appeals ruled that because Hills' Pet complied with its contractual obligation to procure insurance, Idealease of Flint should be granted summary disposition on its claim that Hills' Pet had breached its contract to procure insurance. That ruling is shockingly mistaken. This Court should grant leave to say so or peremptorily reverse the Court of Appeals' ruling and set matters quickly to right.

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ARGUMENT III

The plaintiffs seek indemnity for their own negligence. Contemporaneous with the signing of the National Agreement, its indemnity term was amended by Schedule B to say that Hills' Pet would not indemnify for the indemnified parties' "direct responsibility or negligence." Neither plaintiff should have been granted indemnity based on the National Agreement.

a. First off, Idealease of Flint should not have been allowed to secure indemnity under the National Agreement, which it formally disavowed.

Hills' Pet submits that when a party pitches its tent in one indemnity contract and bypasses another, as Idealease of Flint clearly did in the Court of Appeals, an appellate court cannot substitute its judgment for that of the party seeking indemnity. Idealease of Flint specifically disavowed that the National Agreement governed it as to the Heads' claim. Once the panel determined that the Rental Agreement could not control, that should have been the end of any argument about indemnity (or insurance obligations) running in favor of Idealease of Flint.

Idealease of Flint's decision to seek relief, on appeal, only under the Rental Agreement should have been be respected by the panel.

"Waiver is the intentional relinquishment of a known right." *Book Furniture v Chance*, 352 Mich 521, 526 (1958). Waiver "implies an election to forego some known advantage which might have been insisted upon." *Couper v Metropolitan Life*, 250 Mich 540, 544 (1930). "The usual manner of waiving a right is by acts which indicate an intention to relinquish it, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive." *Bailey v Jones*, 243 Mich 159, 162 (1928). In this case, Idealease of Flint formally waived any rights under the National Agreement.

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There is simply no precedent for an appellate court concluding that a contract can create indemnity (or insurance procurement) obligations running in favor of a party who has formally waived and *specifically disavowed* that the contract had any power to create such entitlements. "Where counsel eliminates an issue through concession, an appellate court may not treat the matter as if it were open for consideration." *Assoc of Hebrew Teachers v Jewish Welfare Federation*, 62 Mich App 54, 57 (1975) citing *In re Reh's Estate*, 196 Mich 210, 216 (1917).

b. The words of the contract, and if the words are ambiguous then resort to extrinsic evidence of the surrounding circumstances, govern indemnity obligations.

As this Court explained in *Michigan Chandelier v Morse*, 297 Mich 41, 49 (1941) quoted approvingly in *Zurich Ins v CCR & Co (on Reh)*, 226 Mich App 599, 603-604 (1997), extrinsic evidence of the contracting parties' intent is only off-limits to courts when the contract language is clear and unambiguous:

> We must look for the intent of the parties in the words used in the instrument. This Court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent *when the words used by them are clear and unambiguous and have a definite meaning.* [Emphasis added.]

"[A] written contract is construed according to the intentions therein expressed, *when those intentions are clear from the face of the instrument.*" *Zurich Ins, id.* at 604 [emphasis added].

"In construing any contract, whether one of indemnification or otherwise, the court will ascertain the intent of the parties both from the language used and from the surrounding circumstances." *Zurich Ins Co, id.* at 607. "The meaning to be discovered and applied is that which each party had reason to know would be given to the words by the other party. Antecedent and surrounding factors that throw light upon this question may be proved by any

kind of relevant evidence." *Zurich Ins,* at 608 (quoting 3 Corbin, Contracts, § 579, pp 418-420).

Pritts v J I Case, 108 Mich App 22 (1981) is illustrative. Relying on this Court's decision in *Vanden Bosch v Consumers Power,* 394 Mich 428 (1975), the panel explained how even the most broadly worded indemnity contracts still must pass muster under a surrounding circumstances test:

> In Michigan, the rule appears to be that broad, all-inclusive indemnification language may be interpreted to protect the indemnitee against its own negligence if such intent can be ascertained from the other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the parties. [*Id.* at 28].

The *Pritts* panel enforced indemnity, but only on the language of the contract *coupled with* an examination of the surrounding circumstances. The surrounding circumstances showed: (1) the person who signed the contract admitted he was aware that such construction contracts commonly contained indemnity clauses, (2) he was not concerned with that possibility so he signed the contract without reading it, and (3) the indemnitee's signatory testified that the intent was to secure indemnity regardless of whether the liability was attributable to the manufacturer's fault, the customer's fault, a third party's fault, or the indemnitee's own fault.

Pritts is no aberrant case in its interpretation of the principles this Court announced in *Vanden Bosch*. In a series of Michigan indemnity cases in the modern era, courts have made a beeline for the surrounding circumstances *without* even first identifying any ambiguity in the contract language. See *Sherman v DeMaria Bldg*, 203 Mich App 593, 598-599 (1994) ("Having determined that the contract language was unambiguous," the parties' intent was established by certain additional, non-indemnity terms, by the fact that the parties knew their employees would be on the job site at the same time, and because the possibility an injury could result from the indemnitee's negligence was apparent when the parties entered into the

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contract); *Fischbach-Natkin Co v Power Processing Piping*, 157 Mich App 448, 454 (1987) (indemnity ruling based, not only on contract language, but on the parties' intent as evidenced by the fact that employees of both parties would be present in a common work area making the possibility of injury due to the indemnitee's negligence apparent when the parties entered into the contract); *Chrysler v Brencal*, 146 Mich App 766, 772 (1985) (indemnity ruling based on surrounding circumstances of: (1) the indemnitor "is an experienced contractor, but nowhere near the size of" the indemnitee, (2) the number of indemnitor's employees, (3) before the disputed contract, indemnitor had bid on some 5000 of indemnitee's contracts, and (4) the applicable indemnity language is part of a standard rider attached to the indemnitee's purchase order); *Paquin v Harnischfeger Corp*, 113 Mich App 43, 53 (1982) (indemnity ruling based on: (1) contract language, (2) that the parties knew their employees would be in a common work area, (3) the indemnitor was a large company, and (4) the indemnitor's agent who prepared the bid was well-educated and familiar with indemnity provisions); *Fireman's Fund Ins Co v General Electric Co*, 74 Mich App 318, 326 (1977) (the surrounding circumstance doctrine is part of the "strict construction" rule for indemnity contracts, enforcing the view that courts should deny indemnity when no one saw a contract containing the term before it was signed and there was no discussion of indemnity at any time to bring the term to the indemnitee's attention).

In this case, the contracting parties' most senior officers negotiated the National Agreement over a ten-month period. Schedule B amended the core indemnity term of the National Agreement precisely in order to "soften" the term so that Idealease entities would retain personal responsibility for their own negligent acts. Hills' Pet submits that the clear import of the parties' contract should have compelled the Court of Appeals to find in Hills' Pet's favor and rule that it was not required to indemnify the plaintiffs. But, if the parties'

words do not compel this result, then surely an examination of the surrounding circumstances creates it.

c. *The National Agreement does not create any indemnity obligation because Head sued Tri-County and Idealease of Flint only for their negligence and sought to hold them liable only for damages that are their direct responsibility.*

According to plaintiffs' witnesses, Schedule B to the National Agreement, particularly its paragraph 10 dealing with indemnity, was negotiated as "a modification or a softening of" the original indemnity language contained in paragraph 10 of the Idealease-proposed agreement.[69] The Hills' Pet-favorable softening language inserted into paragraph 10 by the Addendum is: "Unless such action is proved to be the direct responsibility or negligence of the Lessor..." [ellipses in original] This language relieves Hills' Pet from any obligation to indemnify Idealease of Flint, who leased and owned the vehicle as well as Tri-County (who claims to be an Authorized Member) because the Heads' lawsuit arises out of Plaintiffs' "direct responsibility or negligence." Even Plaintiffs' parent company's vice-president admitted that Hills' Pet has no indemnity obligation "in instances of negligence where it was proved to be our direct—or the lessor's direct responsibility."[70]

The Heads' Complaint against the Plaintiffs argued that Head was injured because Tri-County and Idealease of Flint supplied him a vehicle that they knew "should not be driven on public highways."[71] If the Heads established liability at all in their action against the Plaintiffs, then that liability would necessarily arise out of Plaintiffs' "direct responsibility or negligence." Under the express terms of Schedule B, Hills' Pet did *not* agree to indemnify the Plaintiffs for such losses.

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[69] ***Exhibit G***, Murphy Deposition, p 18.
[70] *Id.*
[71] ***Exhibit K***, Heads' Complaint, ¶ 14.

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Where, as here, unambiguous language in an indemnity agreement limits indemnification, including by excluding indemnity for plaintiffs' negligence, our Courts enforce such agreements as written.

Beaudin v Michigan Bell Telephone Co, 157 Mich App 185 (1986) demonstrates this principle. Beaudin sued Michigan Bell after she tripped over a telephone cord in Kelly Services' office. Michigan Bell filed a third-party complaint against Kelly Services arguing that a tariff approved by the Michigan Public Service Commission obligated Kelly Services to indemnify it against the plaintiff's claim. The tariff required Kelly Services to indemnify Michigan Bell for claims arising out of Kelly Services acts or omissions:

> The customer [Kelly Services] indemnifies and saves the Company [Michigan Bell] harmless against claims for libel, slander, or infringement of copyright from the material transmitted over its facility; against claims for infringement of patents arising from combining with, or using in connection with, facilities of the Company, apparatus and systems of the customer; and *against all other claims arising out of any act or omission of the customer* in connection with facilities provided by the Company. [*Id.* at 186-187.]

The panel held that the language of the tariff limited Kelly Services' obligation to indemnify to acts or omissions of Kelly Services. *Id.* at 188. It concluded that Kelly Services was not obligated to indemnify Michigan Bell for liability attributable to Michigan Bell's sole or concurrent negligence. *Id.* at 188-189.

MSI Construction v Corvo Iron Works, 208 Mich App 340 (1995) reached a similar result. The underlying plaintiff sued MSI for injuries sustained at a work site operated by MSI. MSI filed a third-party complaint against Corvo claiming that Corvo was contractually obligated to indemnify MSI. The language of the indemnity provision required Corvo to indemnify MSI "provided that any such claim is attributable to bodily injury . . . *to the extent caused in whole or in part by any negligent act or omission of the Subcontractor* [Corvo]" or

its agents or employees. *Id.* at 342-343. The Court deciphered the lengthy indemnification clause and arrived at the following paraphrased version:

> To the fullest extent permitted by law, the Subcontractor [Corvo] shall indemnify and hold harmless the Contractor [MSI] from and against all claims arising out of the Subcontractor's work *to the extent caused in whole or in part by any negligent act or omission of the Subcontractor*. [*Id.* at 344, emphasis added.]

The Court of Appeals decided that the limitation of requiring only indemnity for claims "to the extent" of Corvo's negligence, meant Corvo was not obligated to indemnify MSI for MSI's *own* negligence. *Id.* See also *Hubbert v Acme Equipment Co*, 55 Mich App 313, 316 (1974) (an equipment lessee was not obligated to indemnify the lessor for its own negligence where the parties' agreement only required indemnification for claims arising from the lessee's use of the equipment).

In this case, the plaintiffs cannot be found liable for anything except damages that are proved to be caused by their own negligence. When an indemnity obligation is framed in such terms, the abolition of joint liability relieves the indemnitor of any hold harmless obligation. *Ormsby v Capital Welding*, 255 Mich App 165 (2003) rev'd on other grnds 471 Mich 45 (2004) explains. In a matter not considered in the Supreme Court opinion, Monarch cross-appealed in the Court of Appeals as against Capital Welding. Capital Welding agreed to indemnify Monarch for the negligent acts of Capital Welding's subcontractors and sub-subcontractors. The principal plaintiff's complaint was premised on *Monarch*'s own fault, under theories of retained control and common work area liability. The trial court granted summary disposition on Monarch's indemnity claim. Capital Welding successfully argued that because Monarch must be found negligent before the principal plaintiff could succeed, and because Monarch could not be held negligent "for any damages that exceeded its own fault," no indemnity was owed.

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The indemnity agreements in *Beaudin*, *MSI*, *Hubbert* and *Ormsby* were all more of a "stretch" to limit or prevent indemnity than in the present case. Here, the parties expressly agreed that indemnity would not be provided for claims of the indemnified parties' "direct responsibility or negligence."

The Court of Appeals erred in snatching away the bargained-for benefit of the Schedule B Addendum. The Court of Appeals decided that when the parties negotiated the National Agreement to include the Addendum and qualified paragraph 10 dealing with indemnity, they only meant that amendment to apply to Idealease Services Inc., the party the National Agreement identifies as "Lessor." The amended term states that indemnity applies:

> 10. Unless such action is proved to be the direct responsibility or negligence of the Lessor... [ellipsis in original].

In fact, Idealease of Flint *did* lease the vehicle and Idealease Services, Inc. was not *truly* the lessor. Plaintiffs agree this is the reality of the transaction: "Although the language of the "VEHICLE LEASE" says Idealease Services, Inc. is providing the vehicles and maintaining them, it is not. Performance is the responsibility of others." Plaintiffs' Court of Appeals Brief, p 9.

Throughout the National Agreement's indemnity term (and in the insurance procurement term), "who" is being indemnified is repeatedly set forth as the "Lessor, Owner, IDEALEASE INC., and all Authorized Members." Over and over again this language appears. When Schedule B amended the boilerplate language of the indemnity term to exclude indemnity for the negligence of "the Lessor...," its use of an ellipsis clearly denoted that the amendment applied to the "Lessor, Owner, IDEALEASE INC., and all Authorized Members." In fact, *in four other places in the one-page Schedule B*, an ellipsis was used to show insertion into the stream of words used in the master agreement.[72]

[72] ***Exhibit E***, ¶4F, 5F, 5N, and 9B(1).

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An "ellipsis" is "the omission of one or more words that are obviously understood but that must be supplied to make a construction grammatically complete." (Merriam Webster's Collegiate Dictionary 10th Ed). To use an "ellipsis" is to "indicate *an intentional omission of words or letters* or an abrupt change of thought, lapse of time, incomplete statement, etc." (Webster's New World Dictionary).

The Court of Appeals decided that what the parties to the National Agreement bargained for was a Schedule B indemnity modification that applied only to Idealease Services, Inc., an entity that was the denominated "Lessor" in the agreement even though it leased no vehicles. The panel accepted that the Addendum was inapplicable to Idealease of Flint, who *actually* leased the vehicle, and to Tri-County who was once an "Authorized Member" in 1994 as to vehicles having nothing to do with Head's accident. The panel's interpretation is not consistent with the words and grammar of the contract. It is also not consistent with the extrinsic evidence that the parties' shared intent was to create a less onerous indemnity burden for Hills' Pet than the core National Agreement terms created.

Judge Zahra wrote on the ellipsis issue in his separate opinion. (***Exhibit A,*** J. Zahra, fn 1). He was unconvinced that the ellipsis expanded the categories because he saw the use of the ellipsis in three other paragraphs (5F, 5N and 9B1) in the Addendum as being "inconsistent" with the argument Hills' Pet made.

Phrases that supply a series of status nouns and begin with "lessor" appear **ten** times within the insurance terms and the indemnity terms (paragraphs nine and ten respectively) of the core provisions of the National Agreement. *Consistently*, the phrase used is "Lessor, Owner, Idealease Inc" and either "authorized member" or "member." See ¶9(A)(1) [three uses], ¶9(A)(3) [one use], ¶9(D) [five uses], ¶10 [two uses]. The ellipsis used in the Addendum at ¶10 must be examined with respect to the core agreement, not the Addendum, to understand what the writers of the Addendum intended it to signify. However, the use of the ellipsis is not

"inconsistent" within the Addendum. Each of the five times an ellipsis is used it consistently signifies that words were omitted—different words, each time, once the core agreement is reviewed.

The meaning of the Schedule B Addendum to the National Agreement's indemnity term is clear and that meaning is fatal to plaintiffs' claim. Where the "Lessor... [Owner, Idealease Inc. and all Authorized Members]" are negligent or are sued for their direct responsibility for actions causing harm, Hills' Pet did not agree to indemnify them. The trial court ruled correctly. The Addendum applies. That is the only construction of the contract that is consistent with the parties' intent, as measured by the words of the contract and as informed by the surrounding circumstances.

RELIEF REQUESTED

Defendant/Appellant Hills' Pet Nutrition, Inc. asks this Court to peremptorily reverse the majority opinion and grant summary disposition in its favor as to plaintiff Tri-County International Trucks, Inc.'s contractual indemnity claims against Hills' Pet, in accord with Judge Brian Zhara's opinion, writing in partial dissent. In addition, defendant asks this Court to correct the Court of Appeals' clear error on the claim of breach of contract to procure insurance for the benefit of plaintiff Idealease of Flint and to do so on a peremptory order basis.

In addition and/or in the alternative, defendant asks this Court to grant its Application for Leave to Appeal.

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